

STATE OF MICHIGAN  
COURT OF APPEALS

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BRUCE FRITZ,

Plaintiff-Appellant,

v

JOHN MONNICH, and HOLAHAN, MALLOY,  
MAYBAUGH & MONNICH, P.C., d/b/a  
HOLAHAN, MALLOY, MAYBAUGH,  
MONNICH & DELIE,

Defendants-Appellees.

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UNPUBLISHED

May 20, 2003

No. 235262

Oakland Circuit Court

LC No. 97-541140-NM

Before: Sawyer, P.J., and Murphy and Fort Hood, JJ.

PER CURIAM.

Plaintiff appeals as of right the judgment granting defendants' motion for summary disposition under MCR 2.116(C)(7), (8), and (10). This action involves claims of legal malpractice, breach of fiduciary duty, and alleged violations of state and federal employee polygraph protection acts, MCL 37.201 *et seq.* and 29 USC 2001 *et seq.* The case arises out of defendants' representation and defense of plaintiff and Pontiac Osteopathic Hospital (POH) in a sexual harassment lawsuit. The sexual harassment suit was settled, allegedly without plaintiff's consent, although POH's agreement to settle is not in dispute. Here, plaintiff challenges summary dismissal of his causes of action, and argues that he was entitled to partial summary disposition. We affirm.

We first address dismissal of the legal malpractice claim. On appeal, numerous arguments are presented regarding the interplay between the Michigan Rules of Professional Conduct (MRPC) and a legal malpractice action, the appropriate standard of care and what constitutes a breach of that standard, and the evidentiary burdens and use of expert testimony. We find it unnecessary to address plaintiff's arguments in-depth because he has failed, as a matter of law, to show the requisite injury even assuming that defendants' representation was negligent.

To establish legal malpractice, a plaintiff must prove: (1) the existence of an attorney-client relationship; (2) negligence in the legal representation of the plaintiff; (3) that the negligence was a proximate cause of an injury; and (4) the fact and extent of the injury alleged. *Simko v Blake*, 448 Mich 648, 655; 532 NW2d 842 (1995); *Persinger v Holst*, 248 Mich App 499, 502; 639 NW2d 594 (2001). A plaintiff in a legal malpractice suit must show that but for

the attorney's alleged malpractice, he or she would have been successful in the underlying action. *Radtke v Miller, Canfield, Paddock & Stone*, 453 Mich 413, 424; 551 NW2d 698 (1996); *Coleman v Gurwin*, 443 Mich 59, 63-64; 503 NW2d 435 (1993)(giving rise to the suit within a suit requirement in order to avoid speculative damages); *Colbert v Conybeare Law Office*, 239 Mich App 608, 619-620; 609 NW2d 208 (2000).

The *Colbert* panel, analyzing the “injury” element of a legal malpractice action, ruled:

A claim of malpractice further requires a showing of actual injury caused by the malpractice, not just the potential for injury. *Keliin v Petrucelli*, 198 Mich App 426, 430; 499 NW2d 360 (1993). Although plaintiff claims that it was foreseeable that he would suffer damages as the result of his delay in filing a worker's compensation claim, plaintiff relies solely on speculation and the potential for injury to support his claim. Plaintiff has offered no evidence showing actual injury, i.e., the “fact and extent” of the damages he alleges. *McCluskey v Womack*, 188 Mich App 465, 473; 470 NW2d 443 (1991). [*Colbert, supra* at 620.]

Here, the underlying sexual harassment suit was settled, with POH alone being responsible for making the full settlement payment, not plaintiff. Plaintiff also was not financially responsible for any litigation costs. If the case had proceeded to trial, plaintiff faced the possibility of being personally liable on a judgment. Therefore, there was no financial injury arising out of the settlement, yet there was the prospect of financial injury had there been no settlement.<sup>1</sup> Moreover, the settlement agreement specifically provided that plaintiff and POH denied liability and any wrongdoing, and that the settlement did not reflect an admission of liability. Had defendants not settled the sexual harassment suit, plaintiff's chance of success in the action is a matter that is highly speculative.<sup>2</sup> Regardless, it is apparent that the alleged victim in the sexual harassment suit would not have proceeded against plaintiff alone after settling with POH and receiving compensation. Plaintiff has no actual compensable injury. We also note with significance that the trial court ruled that plaintiff's injury claim was speculative; however, a review of the issues presented in plaintiff's appellate brief reveals a lack of any challenge to that finding. Reversal is not warranted.

With respect to plaintiff's claim of breach of fiduciary duty, claims against attorneys brought on the basis of inadequate representation sound in tort and are grounded in the law of legal malpractice only. See *Aldred v O'Hara-Bruce*, 184 Mich App 488, 490-491; 458 NW2d 671 (1990). Plaintiff alleged that defendants violated their fiduciary duties by failing to exercise reasonable care in representing plaintiff. The gravamen of plaintiff's allegations concerning the alleged breach of fiduciary duties sounded in legal malpractice; therefore, the fiduciary duty

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<sup>1</sup> Recovery in a legal malpractice action is usually the value of the claim in the proceeding in which the negligent act occurred if the client was a plaintiff, or if the client was a defendant, the amount of the judgment imposed upon him. *Coleman, supra* at 63-64.

<sup>2</sup> The ability to assess the “likelihood of success” issue by a trier of fact would be virtually impossible in light of the fact that the alleged victim is now deceased.

claim cannot constitute a separate cause of action and was subsumed by the malpractice claim. Moreover, assuming that some of the specific fiduciary duty allegations are distinguishable, plaintiff's action is defeated as a matter of law because of the highly speculative nature of the alleged damages.

Finally, with respect to the polygraph claims, the trial court correctly determined that collateral estoppel barred plaintiff from relitigating the issues necessary for him to succeed. The issue of collateral estoppel arose based on previous litigation by plaintiff against POH.

Collateral estoppel bars relitigation of an issue in a subsequent, different cause of action between the same parties or their privies when the issue was actually and necessarily determined in a prior proceeding that culminated in a valid final judgment. *Ditmore v Michalik*, 244 Mich App 569, 577; 625 NW2d 462 (2001). The issue must be identical, not merely similar, *Wilcox v Sealey*, 132 Mich App 38, 47; 346 NW2d 889 (1984), and the prior proceeding must have provided a full and fair opportunity to litigate the issue, *Detroit v Qualls*, 434 Mich 340, 357; 454 NW2d 374 (1990).

Plaintiff argues that the polygraph claims against defendants are distinct from those asserted in the previous litigation against POH. With respect to the polygraph examination conducted on March 22, 1995, there was a jury determination in the previous suit that plaintiff was no longer an employee at the time the test was administered; therefore, no liability arose under state and federal law. Thus, under the doctrine of collateral estoppel, any polygraph claims in the case sub judice arising out of the March 22, 1995, polygraph test are barred. Clearly, if plaintiff was no longer an employee at the time, plaintiff's agency theory of liability could not be pursued against defendants.

Additionally, in regard to plaintiff's refusal to take a requested polygraph test prior to March 22, 1995, the trial judge in the earlier litigation granted summary disposition against plaintiff on the polygraph claims, ruling that plaintiff failed to allege or present any proof of damages. Therefore, any polygraph claims here arising out of pre-March 22, 1995, polygraph requests were properly dismissed on the basis of collateral estoppel. To the extent that there may have been additional instances in which defendants, on POH's behalf, requested plaintiff to take a polygraph examination, dismissal was still proper because plaintiff's complaint alleged injuries and damages arising solely out of the March 22, 1995, examination. The polygraph claims were properly dismissed.

Affirmed.

/s/ David H. Sawyer  
/s/ William B. Murphy  
/s/ Karen Fort Hood